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January 18, 2006

Hon. Kevin Martin, Chairman
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

RE: RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) OF 1991, 47 CFR PART 64, (DKT No 02-278).

Dear Chairman Martin:

On behalf of the 600,000 small-business owners represented by the National Federation of Independent Business (NFIB), I am writing to offer comments on the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking on rules and regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991, listed in the Federal Register on December 19, 2005 (70 Fed. Reg. 75102). NFIB and its members have had firsthand experience with the implementation of the regulations underlying TCPA, and have several recommendations for implementation of the Junk Fax Prevention Act (JFPA). Our comments focus on the established business relationship (EBR), the requirements to include an opt-out notice and exemptions for small businesses and non-profit associations. We submit these comments both as a trade association representing its members, and as a regulated entity subject to the FCC rules to implement the JFPA.

The JFPA amends section 227 of the Communications Act of 1934 relating to unsolicited facsimile advertisements by requiring senders of unsolicited fax advertisements to include an opt-out notice and a cost-free mechanism that is available 24 hours a day, seven days a week.

Definition of Established Business Relationship

Section 2(b) of the JFPA clearly defines an EBR as:

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

At this time, placing limitations on the EBR is premature and unnecessary. Section 2 (f) of the JFPA spells out a four-part test which establishes when it is appropriate to limit the EBR. The law states that before the establishment of any limits the FCC shall:

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines; (II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers; (III) evaluate the costs to senders of

demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation

on such established business relationship; and (IV) determine whether with respect to small businesses, the costs would not be unduly burdensome.

The FCC has yet to go through any of these steps, so at this point the establishment of a limitation demonstrates a rush to regulate. The limitation suggested by the FCC is unnecessary— no one has identified faxes to *existing* customers as a problem that needs to be “solved.” Congress did not include a time limit on the EBR because they did not find any evidence to support a limitation. Furthermore, the opt-out provision negates the EBR by providing an immediate mechanism to end unwanted fax communications. The opt-out requirement gives the consumer protection against unwanted faxes. Establishing a limitation such as the Federal Trade Commission’s “18/3 month” limitation on phone solicitations, where the EBR is limited to 18 months following a purchase or transaction and three months after an application or inquiry, would impose additional record-keeping requirements.

Significant burdens would be placed on businesses of all sizes in order to comply with a limited EBR. Fax machines are heavily relied upon by smaller businesses to communicate with their customers. Small businesses fax documents such as purchase orders, copies of orders, order confirmations, invoices, copies of invoices, drawings and artwork proofs, and sales tax exemptions. It is small businesses that would face the largest costs complying with a provision limiting the EBR.

Businesses would need to review their customer fax lists and transaction histories daily to ensure that they are in compliance with such a provision. While a small business might be able to provide evidence of an EBR, compiling and frequently checking the customer interactions to establish whether it was a transaction or an inquiry, and the time that interaction occurred would place a significant burden on small businesses with limited staff. Regulatory costs increase as the size of businesses decrease; firms with fewer than 20 employees have regulatory costs

roughly 45 percent higher than larger firms.¹ The estimated average per hour cost of paperwork and record-keeping for small businesses is \$48.72; specifically, the average per hour cost is: \$74.24 for tax-related, \$62.16 for financial, \$47.96 for licenses and permits, \$43.50 for government information requests, \$42.95 for customers/clients, \$40.75 for personnel, \$39.27 for purchases, and \$36.20 for maintenance (buildings, machines, or vehicles).² The typical small business employs a blend of electronic and paper record-keeping. Less than ten percent use paper exclusively and a handful use only electronic means.³ A small business might not have a system in place to effectively comply with this time intensive requirement.

The FCC should recognize that prior express permission may be formed by means other than a signed, written statement indicating the recipient's consent to receive fax communications. A customer who provides their contact information, whether orally or through written means, in the course of business is offering an express invitation or permission to be contacted by that business. The FCC also should recognize that consumers voluntarily agree to make a fax number available for public distribution when the individual or consumer's fax number is publicly provided on letterhead, fax cover sheet, or websites.

Opt-Out Notice

The FCC currently requires senders of fax messages to identify themselves and the number of the machine sending the message. The goal should be to have businesses provide an opt-out mechanism in the least burdensome way possible. NFIB does not believe it is necessary for the FCC to set forth rules to define what should be

¹ W. Mark Crain "The Impact of Regulatory Cost on Small Firms," Office of Advocacy, Small Business

Administration, Washington, DC, 2005, <http://www.sba.gov/advo/research/rs264tot.pdf>.

² NFIB National Small Business Poll, "Paperwork and Record-keeping" December 17, 2003.

³ NFIB National Small Business Poll, "Paperwork and Record-keeping" December 17, 2003.

considered “clear and conspicuous” notice. Small firms can use a variety of different means to create their cover sheet whether it is computer generated, made with a typewriter or handwritten. Spelling out what is considered “clear and conspicuous” might not consider all possible means of including an opt-out option. The meaning of the terms *clear* and *conspicuous* is obvious enough to demonstrate that the opt-out notice cannot be hidden or unintelligible.

The definition for *cost-free* mechanisms for a do-not-fax request should be as flexible as possible, including but not limited to the provision of a local telephone number, toll-free telephone number, website, or email address. NFIB contends that requiring businesses to have a toll-free 800 number when they only conduct business locally and have no other business reason for providing such a number would be too costly, and that the provision of a local number should be sufficient in such an instance. The provision of an email address or website should be allowed but should not be mandatory, despite the widespread use of email. Many small businesses do not utilize email and rely on other methods for their business communications. Only 58 percent of users employ the Internet regularly for business purposes.⁴

The sender should only be required to honor a request made by the method prescribed in the opt-out notice. If a recipient contacts the sender by another means then the sender should not be liable if the recipient continues to receive faxes. While this may not be a problem with smaller businesses, an organization such as NFIB, with offices in all 50 states and numerous points of contact with the membership, could not guarantee that a request would be honored if it did not go to the specific contact point.

⁴ NFIB National Small Business Poll, “Paperwork and Record-keeping” December 17, 2003.

NFIB supports the FCC's 30-day limitation in which a sender should comply with a request not to receive future fax communications. Thirty days is the shortest reasonable period and NFIB cannot support any shorter time period.

NFIB supports an opt-out period of five years. Fax numbers, like phone numbers, churn. Original subscribers often close their accounts and those fax numbers are subsequently reassigned. Making the opt-out request permanent would mean that a customer assigned a number, which had previously been used by another who had sent a do-not-fax request, would not be able to receive information from a vendor without sending written consent.

Small Business Exemption

NFIB supports a small business exemption from the requirement to provide a cost-free mechanism for a do-not-fax request. NFIB recommends that the FCC adopt the exemption based on the size standards created by the Small Business Administration (SBA). Based on the industries predominantly affected by this regulation (services, retail, and wholesale distributors) the SBA defines small business as firms with 100 or fewer employees for wholesalers and firms with \$6 million or less in receipts for retail and services. In order to ensure proper compliance, NFIB recommends adopting a standard based on firm size at 100 employees or fewer. This standard would ensure that all small businesses covered by this regulation are included in the exemption, which is of particular importance because "cost-free" has yet to be defined. Allowing for a small business exemption would alleviate the financial imposition the toll-free provision could cause while maintaining the goals of the JFPA and the TCPA. The adoption of an employee-based standard as opposed to a receipts-based standard would make the determination easier for small business, thereby improving compliance.

Third-Party Senders

In the NPRM, the FCC asks for comments on whether do-not-fax requests sent by a third-party agent or fax broadcaster would extend to the underlying business on whose behalf the fax is transmitted. NFIB maintains that a do-not-fax request applies only to the underlying business sending the fax. Third-party providers should be able to continue faxing recipients if they are on other business lists since many recipients are on multiple fax lists. Erroneously applying a do-not-fax request to third-party senders instead of the original sender could result in NFIB members not receiving vital information to which their membership entitles them.

Nonprofit Exemption

NFIB supports allowing professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited fax communications to their members that do not contain an “opt-out” notice. NFIB’s members are customers who have contracted with NFIB to provide them with timely and relevant information on a regular basis. NFIB membership entitles them to receive such information via fax, which is a more effective way to communicate with our membership. By using the simple guideline of assuming that contact information given to NFIB by the membership constitute permission to use that information, it enables NFIB to provide the goods and services the membership has requested.

Conclusion

The FCC’s efforts to protect consumers from junk faxes have wrongly placed burdens on credible businesses trying to legitimately communicate with their customers. The suggestion by the FCC to limit the EBR would be just as cumbersome and burdensome as the requirements that initially prompted the passage of the JFPA. The FCC has not been able to demonstrate that the problem with unsolicited faxes is one that concerns the EBR. As the FCC moves forward with implementation they should recognize the impacts that this will have on small businesses and nonprofit associations. The small business and nonprofit

exemptions are necessary to ensure that these entities, which do not have the resources to comply with these regulations receive, some relief from the costs.

NFIB appreciates the opportunity to provide comments on the FCC's Notice of Proposed Rulemaking on rules and regulations implementing the Telephone Consumer Protection Act of 1991. Please do not hesitate to contact us if you require any additional information, or if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Danner", with a long horizontal flourish extending to the right.

Dan Danner
Executive Vice President
Public Policy and Political